FILE COPY

Office Supreme Court U.S.
AUG 24
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 188

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

HAROLD R. ALL, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GEORGE B. CHRISTENSEN,
WILLIAM T. KIRBY,
JAMES D. HEAD,
DAVID J. HARDY,
Attorneys for Petitioner.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago 3, Illinois,
Of Counsel.

THE BLACKHOAP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 188.

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

HAROLD R. ALL, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Respondent's brief in opposition to certiorari is largely an effort to evade the question. It is a studied attempt to portray the case as merely one in which the petitioner recognizes that a valid assessment has been made and is attempting only to contest its "amount." That is not this case at all. Petitioner comes to this Court with undisturbed findings of fact (Pet. App. p. 7 *et seq.*) by the District Court, based upon admissions of the Revenue Agent who built the so-called assessment, that it was not a good faith valuation of tax liability but a deliberate over-assessment and hence, we submit as the District Court found, wholly illegal.

Without exception, the cases relied upon by respondent are cases in which the taxpayer was seeking relief solely on the ground of hardship and presented no question as

to the regularity and validity of the assessment. Such cases have no relevance to this proceeding in which petitioner has obtained binding findings of fact not that the assessment was merely incorrect as to amount, but that it was grounded upon no rational basis and was deliberately put at a fantastically excessive amount for the purpose, and with the intention, of completely destroying petitioner and its ability further to contest either the criminal or civil liability asserted against it (Pet. App. pp. 10-12).

On the other hand, the cases cited by petitioner (Pet. p. 28) show beyond any question of doubt that it is an established principle of law that an assessment which is "so grossly out of proportion * * * as to show that the assessor could not have been honest" or "is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons" is a fraudulent assessment which "amounts to no assessment at all." In *Hill* v. *Wallace* (1922), 259 U. S. 44, 68, 42 S. Ct. 453, this Court said that a taxing statute which imposes a tax for improper purposes "cannot be sustained as an exercise of the taxing power of Congress conferred by § 8, Article I" of the Constitution—the same necessarily is true of an assessment because it cannot be that Congress is bound by the Constitution but minor civil servants are not (See *Yoshimura* v. *Alsup*, quoted below).

Respondent's contention that it is immaterial whether the officials of Internal Revenue Service acted in good faith in making this fantastic assessment, so long as the statute imposing the income tax and vesting in them powers of administration is valid, is squarely refuted by decision of the Court of Appeals for the Ninth Circuit in *Yoshimura* v. *Alsup* (1948), 167 F. 2d 104. In that case the Court said that (at p. 106):

> "We can see no difference in a coercion by statute and such coercion by the statutory officers for the enforcement of the tax laws. This is 'the unusual, the extraordinary case' referred to in our opinion in *Matcovich* v. *Nickell*, 9 Cir., 134 F. 2d 837, 838; the 'gross and indisputable oppression' of *Concentrate Mfg. Co.* v. *Higgins*, 2 Cir., 90 F. 2d 439, 441; and the 'arbitrary and capricious conduct' of *Burke* v. *Mingori*, 10 Cir., 128 F. 2d 996, 997 and of *Jacoby* v. *Hoey*, 2 Cir., 86 F. 2d 108, 109."

Respondent's attempt to assert that the income tax law vests in administrative officers of the Internal Revenue Service unlimited powers, not subject to any judicial restraint, to take any arbitrary, capricious and oppressive action against any person who is subject to income taxes under the statute necessarily falls by its own weight.

Apart from the fact that it is settled that an assessment which is not made in good faith is a fraudulent assessment having no legal validity, it is inconceivable that Section 7421 of the Internal Revenue Code can constitutionally operate to deprive the courts of jurisdiction to protect citizens by injunction from such illegal and oppressive acts of administrative officers, who are charged with the duty to apply the statutory provisions enacted by the Congress fairly and impartially and solely for the purpose of collecting the legal amount of the liability imposed by the taxing statute.

Although respondent's brief attempts to obscure the facts, it must be remembered that the fact that the jeopardy assessment was not made in good faith, but was a fraudulent assessment deliberately put at a fantastically insupportable figure for the purpose of destroying the petitioner and preventing it from further effectively defending itself against the pending criminal charges and asserted civil liabilities and penalties, does not rest upon mere allegations in petitioner's complaint, but is a fact found

by the District Court which was not challenged in, or disturbed by, the Court of Appeals. The undisputed evidence submitted at the hearing impelled this finding of fact, even though the Government, by asserting a spurious claim of privilege (which was promptly abandoned when the case reached the Court of Appeals), refused to obey the Court's order to produce the admittedly relevant documents.

While respondent now asserts (Br. p. 7) that the refusal to obey the District Court's admittedly valid discovery order for production of these documents was because it was not required to enter into "a dispute about the amount of liability" in the District Court, it is quite plain that this is but a mere inaccurate afterthought. No such position was asserted below; there "Mr. Rita and Mr. McNelis * * * stated and represented that the Attorney General declined to produce any of the said material on the *sole ground* that all of it was governmentally privileged * * *" (App. B., p. 8). The reasonable inference is, and we contend, that production of such documents would have further documented a shocking picture of abuse of administrative power for wholly improper purposes foreign to the collection of any tax liability which might conceivably be imposed by the statute.

The Conflict with Other Circuits.

It is idle for respondent to assert (Br. p. 10) that there is no conflict between the decision of the Court of Appeals in this case and the decisions of other Courts of Appeal cited by petitioner (Pet. p. 21). While respondent claims that such decisions "are all clearly distinguishable on their facts and present no conflict of law," it is obvious that if the decision sought to be reviewed is correct, each of the decisions cited by petitioner would be wrong because in each of them the taxing statute involved was a valid

statute and the taxpayer was a person who could be liable to pay taxes legally imposed by that statute. Thus, the cases to which we have drawn attention are clearly in conflict with the decision sought to be reviewed for it holds that no person within the ambit of the income tax law can state a case for equitable relief no matter how illegally an assessment be made or how illusory his other remedies may be. This case will, unless reviewed, hereafter be cited and relied upon by the Internal Revenue Service for that, we believe, shocking and unconstitutional proposition. It stands squarely for the proposition that in no circumstances can a potential income tax payer obtain equitable relief—the other circuits squarely hold to the contrary as did the first opinion herein.

That the facts involved in other cases are not the same as those presented here is (fortunately for citizens) not surprising. The callous and wanton abuse here shown fortunately is seldom encountered. But any question of fact is, of course, wholly irrelevant to the question as to whether the novel doctrine announced by the Court of Appeals in this case is an erroneous determination of the applicable law based upon the Court's misinterpretation of *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498.

The impossibility of reconciling the instant decision with the law of other circuits or with the first decision of the Seventh Circuit herein (242 F. 2d 645, Pet. appendix p. 20 *et seq.*) is pointed up by two recent decisions of the Sixth Circuit holding that Section 7421 (a) of the Internal Revenue Code does not bar full development of the facts in an injunction suit and does not necessarily bar injunction relief. Those cases are *Lassoff, et al.* v. *Gray*, 266 F. 2d 745 (May 14, 1959) and *U. S. Mut'l. Benefit Ass'n.* v. *Welch*, 59-2 USTC Par. 9561 (June 22, 1959). The first involved the Gambling Tax law and the second the Social Security Tax law. In both it was held error for Dis-

trict Courts to have dismissed complaints for injunctions and the cases were remanded because the "restraint [of Section 7421 against injunctions] is not absolute and an exception to its application is recognized in those cases which present extraordinary and exceptional circumstances requiring the interposition of a court of equity," (59-2 USTC at p. 73,385) and "* * * the factual situations in these cases should be fully developed through a hearing in the trial court" (59-2 USTC at p. 73,385). That is language, and those are holdings, equivalent to the initial holding of the original panel of the Seventh Circuit herein that the District Court determine "the facts playing in, on or about the assessment", (Pet. appendix p. 38). The full development of such facts was frustrated by the Government's subsequent refusal to make discovery. The second decision of the Court of Appeals of which we seek review holds in essence that it makes no difference what the facts were because Section 7421 (a) absolutely bars injunctive relief for persons in petitioner's category. The conflict is clear, inescapable and of deep consequence to all taxpayers.

Moreover, if it be thought that a distinction can be created from the fact that in *Miller* the complainant alleged he did not make margarine, or in *Lassoff* that he was not a gambler, or in *U. S. Mut'l. Benefit* that he was not an employer so that the particular tax at the particular time involved could not apply, we point out that such is no distinction because petitioner denies here that it had any additional net income on which a tax was owing. Two things must exist for income tax liability—the person must be a person in the category to whom the tax can apply *and* he must have taxable income.

Respondent further contends that even if the Court of Appeals erred in its determination that it had no jurisdiction over this case for the reasons stated in its opinion, nevertheless certiorari should be denied because there are

no special and extraordinary circumstances presented to bring the case within a recognized head of equity jurisdiction (Br. pp. 8-10). He points out that the jeopardy assessment was not made until after the continual harassment of petitioner's customers by internal revenue agents had forced it to liquidate its business so that it was no longer a going business concern. Since petitioner has never made any contention that the illegal assessment would destroy a going commercial business, this is only a straw man argument. Our argument and the District Court's finding of fact No. 5-12 (Pet. App. p. 13), goes much further—here the taxing power was being used to totally destroy petitioner as an entity, for enforcement of the levy would have rendered petitioner unable even to maintain its corporate existence, much less to engage in the necessary criminal and civil litigation to show that it in fact owed no additional taxes whatsoever.

Respondent claims that if this is true, it is "irrelevant," and states that "It is well established that the theoretical possibility of such a contingency affords no basis for enjoining the enforcement of a jeopardy assessment" (Br. p. 9). None of the three cases cited by respondent in support of the foregoing argument offers any support for the contention:

O'Connor v. *United States* (CA 4, 1953), 203 F. 2d 301, was an appeal from a criminal conviction for tax evasion. The Court held that the mere levying of a valid jeopardy assessment did not necessarily preclude the Government from obtaining an indictment and subsequently prosecuting an income tax evasion case, and further held on the facts that the taxpayer was in no way embarrassed or discommoded in preparing or presenting its defense in the criminal case. *United States* v. *Brodson* (CA 7, 1957), 241 F. 2d 107, held that the mere fact that a jeopardy assessment had been levied was not a sufficient ground

for dismissal of an indictment for income tax evasion. The instant case is wholly civil and the injunction against the assessment in no way interfered with the companion criminal indictment. Obviously neither the *O'Connor* nor *Brodson* case bears any similarity or is in any way relevant to the question here under consideration.

Respondent relies heavily upon *Lloyd* v. *Patterson* (CA 5, 1957), 242 F. 2d 742; where the Court refused to restrain collection of what apparently was admitted to be a valid jeopardy assessment on the ground that, on the record before it, it could not then determine whether the seizure of the taxpayer's assets pursuant to such assessment would result in denying its constitutional rights to a fair hearing in the civil tax case. At the time of the Court's decision, criminal proceedings which were pending when the suit was originally filed had been disposed of by a plea of *nolo contendere* and a nominal fine so as to render moot that part of the taxpayer's original complaint. Obviously the case is not in point because there was no question of fraudulent assessment for an improper purpose there involved. Even if that were not so, the case clearly does not support respondent's contention that the Court of Appeals would have been justified in disregarding the District Court's findings of fact in this case and dismissing petitioner's complaint without affording it the opportunity of a hearing to determine whether the theoretical possibility of a re-determination by the Tax Court would furnish an adequate remedy at law under the special facts and circumstances in this case.

All that the Fifth Circuit decided in *Lloyd* v. *Patterson* was that the record before it was not sufficient to enable it to reach any final determination as to whether the taxpayer's constitutional rights to a fair hearing in the civil case would be adequately preserved in the absence of the requested injunctive relief. In the present case, the

District Court has found as a fact that the seizure of all of petitioner's funds and assets under the illegal assessment would have the effect of preventing it from maintaining its corporate existence and from defending itself and prosecuting an action "to recover the unlawful exaction • • •" (Finding 5-12, Pet. App. p. 13). This finding must stand.

Finally we suggest that an argument that the result reached below could be sustained on grounds other than those announced by the Seventh Circuit, even if correct (which we deny), is no sound reason for denial of certiorari. The decision has gone in the books as one flatly holding that in no event can there be relief—it will be cited throughout the country for *that* proposition. It is binding in the Seventh Circuit and may be relied on in the 1st, 3rd, 10th and District of Columbia Circuits (where the question may be considered open), while contrary law prevails elsewhere. The matter is one of vast importance and should be settled here.

It is respectfully submitted that the writ of certiorari should issue.

GEORGE B. CHRISTENSEN,
WILLIAM T. KIRBY,
JAMES D. HEAD,
DAVID J. HARDY,
Attorneys for Petitioner.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago 3, Illinois,
Of Counsel.